



FINANCIAL PLANNING  
ASSOCIATION *of* AUSTRALIA

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22 March 2017

Financial Services Unit

Financial System Division

The Treasury Langton Crescent

PARKES ACT 2600

Email: [ProductRegulation@treasury.gov.au](mailto:ProductRegulation@treasury.gov.au)

**Re. Design and Distribution Obligations and Product Intervention Power**

Dear Sir/Madam,

We welcome to opportunity to comment on the proposals paper for the design and distribution obligations and product intervention powers. We agree that product design and distribution arrangements should be appropriate for the product's target market.

If you have any queries or comments, please do not hesitate to contact me at [policy@fpa.com.au](mailto:policy@fpa.com.au) or on 02 9220 4500.

Yours sincerely

**Dimitri Diamantes CFP®**

*Policy Manager*

Financial Planning Association of Australia<sup>1</sup>

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The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
  - In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
  - We have an independent conduct review panel, Chaired by Mark Vincent, dealing with investigations and complaints against our members for breaches of our professional rules.
  - The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
  - We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, as a minimum, an approved undergraduate degree.
  - CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
  - We are recognised as a professional body by the Tax Practitioners Board.
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# **DESIGN AND DISTRIBUTION OBLIGATIONS AND PRODUCT INTERVENTION POWER**

FPA submission to:  
Treasury

22 March 2017

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## **INTRODUCTION**

We welcome to opportunity to comment on the proposals paper for the design and distribution obligations and product intervention powers. We agree that product design and distribution arrangements should be appropriate for the product's target market. However, the proposed reforms should not apply to financial planners as planners are already required to act in the best interests of their clients.

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## PART 2: RANGE OF PRODUCTS COVERED BY THE MEASURES

### QUESTION

1. Do you agree with all financial products except for ordinary shares being subject to both the design and distribution obligations and the product intervention power? Are there any financial products where the existing level of consumer protections means they should be excluded from the measures (for example, default (MySuper) or mass-customised (comprehensive income products for retirement) superannuation products)?

### FPA RESPONSE

We believe a basic level of consumer protection should apply generally. Exempting a class of financial products undermines that protection. In our view, exemptions should be limited to classes of financial products that are widely understood by consumers or where existing protections are of the same level or higher.

We accept that ordinary shares should be exempted given these products are widely understood by consumers. We would note however that not all shares are ordinary in nature and listed investment companies and exchange traded funds can have a similar level of complexity to managed funds.

We support exempting default and mass-customised products on the basis that such products are subject to regulatory controls on product design and the allocation of consumers to a product.

### QUESTION

2. Do you agree with the design and distribution obligations and the product intervention power only applying to products made available to retail clients? If not, please explain why with relevant examples.

### FPA RESPONSE

We are against the design and distribution obligations and the product intervention powers only applying to products made available to retail clients under the current definition of retail clients. The community expects product providers to provide a basic level of assistance to consumers unless the consumer clearly demonstrates – without pressure from the product provider or distributor – informed consent to opt out of the protections.

‘Retail client’ is defined based on, for example, income, net wealth or product value. Persons outside the relevant thresholds should not necessarily be denied basic protections as these factors are not reliable proxies for the informed consent of the consumer to opt out of the protections. A better approach may be to require product design and product distribution arrangements to be aligned with the general level of financial capability of the product’s target market.

### QUESTION

3. Do you agree that regulated credit products should be subject to the product intervention power but not the design and distribution obligations? If not, please explain why with relevant examples.

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## **FPA RESPONSE**

We agree that consumer credit products regulated by the Credit Act should be covered under the product intervention power, but not the design and distribution obligations. The exemption is justified because the responsible lending obligations already provide consumers with a basic level of protection of at least the same standard as the design and distribution obligations, by assessing the particular consumer's capacity to repay.

## **QUESTION**

4. Do you consider the product intervention power should be broader than regulated credit products? For example, 'credit facilities' covered by the unconscionable conduct provisions in the ASIC Act. If so, please explain why with relevant examples.

## **FPA RESPONSE**

In principle, we consider that the product design and distribution obligations and the product intervention power should be broader than products regulated by the Credit Act. This is because, as already discussed, exemptions undermine these basic protections.

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## PART 3: DESIGN AND DISTRIBUTION OBLIGATIONS

### QUESTION

5. Do you agree with defining issuers as the entity that is responsible for the obligations owed under the terms of the facility that is the product? If not, please explain why with relevant examples. Are there any entities that you consider should be excluded from the definition of issuer?

### FPA RESPONSE

We agree with defining issuers as the entity that is responsible for the obligations owed under the terms of the facility that is the product.

### QUESTION

6. Do you agree with defining distributors as entities that arrange for the issue of a product or that:
- (i) advertise a product, publish a statement that is reasonably likely to induce people as retail clients to acquire the product or make available a product disclosure document for a product; and
  - (ii) receive a benefit from the issuer of the product for engaging in the conduct referred to in (i) or for the issue of the product arising from that conduct (if the entity is not the issuer).

### FPA RESPONSE

We agree with the definition if 'arrange' has the same meaning as ASIC has attributed to term for the purposes of interpreting the Corporations Act (see RG 36 *Licensing: Financial product advice and dealing*, <http://download.asic.gov.au/media/1238108/rg36-published-20-august-2013.pdf> D).

### QUESTION

7. Are there any situations where an entity (other than the issuer) should be included in the definition of distributor if it engages in the conduct in limb (i) but does not receive a benefit from the issuer?

### FPA RESPONSE

An entity (other than the issuer) should be included in the definition of distributor if both:

- the entity engages in the conduct in limb (i); and
- the ordinary consumer would reasonably expect that the entity would take reasonable precautions to ensure that ordinary consumers do not choose products that are unsuitable considering the general attributes and circumstances of each class of consumers.

### QUESTION

8. Do you agree with excluding personal financial product advisers (in that capacity) from the obligations placed on distributors? If not, please explain why with relevant examples. Are there any other entities that you consider should be excluded from the definition of distributor?

### FPA RESPONSE

We strongly support excluding personal financial product advisers from the obligations placed on distributors. Financial planners provide personalised advice to clients. The best interests duty under the

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*Corporations Act* already obliges planners to place the particular client in a better position (a high standard), taking into account the client's preferences and situation.

Imposing the distributor obligations on advised distributors adds an unnecessary regulatory burden on advice businesses. At any rate, under the best interests duty financial planners will take into account information the issuer provides under the product design obligation.

### QUESTION

9. Do you agree with the obligations applying to both licensed and unlicensed product issuers and distributors? If they do apply to unlicensed issuers and distributors, are there any unlicensed entities that should be excluded from the obligations (for example, entities covered by the regulatory sandbox exemption)? Who should be empowered to grant exemptions and in what circumstances?

### FPA RESPONSE

We don't support excluding entities covered by the regulatory sandbox exemption from being subject to the product design and distribution obligations and product intervention powers. If the obligations and powers are necessary to provide consumers with a basic level of protection, they shouldn't be overridden simply for potential innovation gains.

If the standard of consumer protection is regarded as too high to be compatible with the goals of efficiency or innovation, then the standard should be lowered across the board.

### QUESTION

10. Do you agree with the proposal that issuers should identify appropriate target and non-target markets for their products? What factors should issuers have regard to when determining target markets?

### FPA RESPONSE

We agree that issuers should identify appropriate target and non-target markets for their products. Factors about consumers that issuers should have regard to when determining target markets include:

- likely need to access capital
- levels of income and wealth
- level of financial literacy
- access to financial information
- capacity to not meet objectives
- tolerance to not meeting objectives

### QUESTION

11. For insurance products, do you agree with the factors requiring consumers in the target market to benefit from the significant features of the product? What do you think are significant features for different product types (for example, general insurance versus life insurance)?

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## FPA RESPONSE

We agree that for insurance products, the target market should derive a benefit from the significant features of the product. For both life insurance and general insurance, significant features include:

- benefit coverage – that is, the totality of features that define the circumstances in which the policy will pay. The totality is a single significant feature.
- access to cover – this is a function of underwriting rigour and timing.
- claims experience – this is a function of all of the following factors:
  - willingness to pay claims that don't fall squarely within the defined circumstances of payment
  - rigour of evidence requirements to prove claims
  - speed of payment after claim proved
  - support provided to insured during claims process

## QUESTION

12. Do you agree with the proposal that issuers should select distribution channels and marketing approaches for the product that are appropriate for the identified target market? If not, please explain why with relevant examples.

## FPA RESPONSE

In principle, we agree that issuers should select distribution channels and marketing approaches for the product that are appropriate for the identified target market. However, such regulation should be modest to avoid destroying the practical conditions for both consumer choice and competition across target markets.

## QUESTION

13. Do you agree that issuers must have regard to the customers a distribution channel will reach, the risks associated with a distribution channel, steps to mitigate those risks and the complexity of the product when determining an appropriate target market? Are there any other factors that issuers should have regard to when determining appropriate distribution channels and market approach?

## FPA RESPONSE

In principle we agree with this approach. However, such regulation should be modest to avoid destroying the practical conditions for both consumer choice and competition across target markets.

In our view, there are no other factors that issuers should take into account when determining appropriate distribution channels and market approach.

## QUESTION

14. Do you agree with the proposal that issuers must periodically review their products to ensure the identified target market and distribution channel continues to be appropriate and advise ASIC if



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the review identifies that a distributor is selling the product outside of the intended target market?

#### **FPA RESPONSE**

In principle we agree with this approach. However, such regulation should be modest to avoid destroying the practical conditions for both consumer choice and competition across target markets.

#### **QUESTION**

15. In relation to all the proposed issuer obligations, what level of detail should be prescribed in legislation versus being specified in ASIC guidance?

#### **FPA RESPONSE**

In our view, the following are crucial:

- the process an issuer must follow to meet their obligations is prescribed in enough detail to give virtual certainty to issuers.
- the concepts regulating the judgements an issuer must make to meet their obligations are prescribed in broad terms in order to allow for flexibility; and ASIC doesn't seek to restrict this flexibility in its guidance.
- rules are set out in the legislation in order to provide a high degree of scrutiny by Parliament. However, legislative power is delegated to override or extend provisions in novel or emergency situations (see below).
- delegated legislation must meet objective criteria, and those criteria are prescribed in the legislation.
- delegated legislative power is restricted to setting out highly technical detail or to responding to novel or emergency situations. We would envisage that, over time, changes to deal with novel situations would be incorporated in the legislation.

#### **QUESTION**

16. Do you agree with the proposal that distributors must put in place reasonable controls to ensure that products are distributed in accordance with the issuer's expectations?

#### **FPA RESPONSE**

In principle, we support this proposal.

#### **QUESTION**

17. To what extent should consumers be able to access a product outside the identified target market?

#### **FPA RESPONSE**

We support consumer choice. Government regulation should not restrict access to products unless there is a general consensus that restriction is required for public safety reasons.

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## QUESTION

18. What protections should there be for consumers who are aware they are outside the target market but choose to access a product regardless?

## FPA RESPONSE

In our view, no new protections should cover this situation.

## QUESTION

19. Do you agree with the proposal that distributors must comply with reasonable requests from the issuer related to the product review and put in place procedures to monitor the performance of products to support the review? Should an equivalent obligation also be imposed on advised distributors?

## FPA RESPONSE

In principle, we support the proposal that distributors must comply with reasonable requests from the issuer related to the product review, and put in place procedures to monitor the performance of products to support the review.

We don't support an equivalent obligation being imposed on advised distributors. Advisers are already subject to a separate regulatory regime to align their advice with the best interests of the particular client. This includes reviewing recommendations on an ongoing basis when a client is in an ongoing advice relationship with the advice provider. Imposing the distributor obligations on advised distributors adds an unnecessary regulatory burden on advice businesses.

## QUESTION

20. In relation to all the proposed distributor obligations, what level of detail should be prescribed in legislation versus being specified in ASIC guidance?

## FPA RESPONSE

In our view, the following are crucial:

- the process a distributor must follow to meet their obligations is prescribed in enough detail to give virtual certainty to issuers.
- the concepts regulating the judgements a distributor must make to meet their obligations are prescribed in broad terms in order to allow for flexibility; and ASIC doesn't seek to restrict this flexibility in its guidance.
- rules are set out in the legislation in order to provide a high degree of scrutiny by Parliament. However, legislative power is delegated to override or extend provisions in novel or emergency situations (see below).
- delegated legislation must meet objective criteria, and those criteria are prescribed in the legislation.

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- delegated legislative power is restricted to setting out highly technical detail or to responding to novel or emergency situations. We would envisage that, over time, changes to deal with novel situations would be incorporated in the legislation.

#### **QUESTION**

21. Do you agree with the obligations applying 6 months after the reforms receive Royal Assent for products that have not previously been made available to consumers? If not, please explain why with relevant examples.

#### **FPA RESPONSE**

In principle, we support this proposal.

#### **QUESTION**

22. Do you agree with the obligations applying to existing products in the market 2 years after the reforms receive Royal Assent? If not, please explain why with relevant examples and indicate what you consider to be a more appropriate transition period.

#### **FPA RESPONSE**

In principle, we support this proposal.

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## **PART 4: PRODUCT INTERVENTION POWER**

### **QUESTION**

23. Do you agree that ASIC should be able to make interventions in relation to the product (or product feature), the types of consumers that can access a product or the circumstances in which a consumer can access the product. If not, please explain why with relevant examples.

### **FPA RESPONSE**

The power to ban or restrict (or restrict access to) products or product features distorts the financial products and services market. As such, we believe that such powers should be limited to dealing with emergency situations (i.e. where there is imminent danger of serious harm to consumers or to the stability of the market). The legislation should include objective criteria for determining whether intervention powers can be used.

### **QUESTION**

24. Are there any other types of interventions ASIC should be able to make (for example, remuneration)?

### **FPA RESPONSE**

Any other types of interventions that are proposed should be subject to a separate consultation.

### **QUESTION**

25. Do you agree that the extent of a consumer detriment being determined by reference to the scale of the detriment in the market, the potential scale of the detriment to individual consumers and the class of consumers impacted? Are there any other factors that should be taken into consideration?

### **FPA RESPONSE**

In principle, we support the extent of a consumer detriment being determined by reference to the scale of the detriment in the market, the potential scale of the detriment to individual consumers and the class of consumers impacted.

### **QUESTION**

26. Do you agree with ASIC being required to undertake consultation and consider the use of alternative powers before making an intervention? Are there any other steps that should be incorporated?

### **FPA RESPONSE**

We strongly support ASIC being required to undertake consultation and consider the use of alternative powers before making an intervention. However, this requirement would obviously be inappropriate in the case of an emergency.

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## QUESTION

27. Do you agree with ASIC being required to publish information on interventions, the consumer detriment and its consideration of alternative powers? Is there any other information that should be made available?

## FPA RESPONSE

We strongly support ASIC being required to publish information on intervention, the consumer detriment and its consideration of alternative powers.

## QUESTION

28. Do you agree with interventions applying for an initial duration of up to 18 months with no ability for extensions? Would a different time frame be more appropriate? Please explain why.

## FPA RESPONSE

We agree with this proposal. We'd also recommend that the intervention couldn't be remade (in substance or form) in order to restart the clock. However, see our response to question 29 (below).

## QUESTION

29. What arrangements should apply if an ASIC intervention is subject to administrative or judicial appeal? Should an appeal extend the duration that the Government has to make an intervention permanent?

## FPA RESPONSE

While an intervention is subject to appeal, the review body should be able to suspend the intervention. Where the appeal doesn't result in the intervention being overturned, the review body should be able to extend the total duration of the intervention beyond 18 months, to take into account any suspension of the intervention.

## QUESTION

30. What mechanism should the Government use to make interventions permanent and should the mechanism differ depending on whether it is an individual or market wide intervention? What (if any) appeal mechanisms should apply to a Government decision to make an intervention permanent?

## FPA RESPONSE

In our view, interventions should only be able to be permanent if they are enshrined in legislation. As already mentioned, the proposed reforms have the potential to be highly distortive. In turn, permanent interventions should be subject to a high degree of Parliamentary scrutiny as the community has no definite prospect of escape from these provisions short of leaving the market.

The mechanism should be the same whether the intervention is individual or market wide. This is because in both cases, the effect on the provider or providers and on the community at large is potentially severe. As such, we believe a high degree of Parliamentary scrutiny is needed.

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If, contrary to our strong preference, permanent interventions are done under delegated authority, we would strongly recommend consultation with affected parties and that independent merits review (by, say, the Administrative Appeals Tribunal) of individual interventions be available.

#### **QUESTION**

31. Are there any other mechanisms that could be implemented to provide certainty around the use of the product intervention power?

#### **FPA RESPONSE**

We recommend legislating criteria that must be satisfied before product intervention powers can be exercised – e.g. based on risk of harm to consumers.

#### **QUESTION**

32. Do you agree with the powers applying from the date of Royal Assent? If not, please explain why with relevant examples.

#### **FPA RESPONSE**

In principle, we support this proposal.

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## **PART 5: ENFORCEMENT AND CONSUMER REDRESS**

### **QUESTION**

33. What enforcement arrangement should apply in relation to a breach of the design and distribution obligations or the requirements in an intervention?

### **FPA RESPONSE**

- Enforceable undertakings
- Suspension or cancellation of financial services licence

### **QUESTION**

34. What consumer rights and redress avenues should apply in relation to a breach of the design and distributions obligations or the requirements of an intervention?

### **FPA RESPONSE**

If a consumer suffers economic loss, they should be able to obtain damages from the provider, distributor and financial planner based on the extent of the responsibility of each party. The product design and distribution obligations should be taken into account in assessing that responsibility. For example, an issuer who identifies an inappropriate target market for their product should bear some or all of the responsibility for a consumer's resulting losses.

Given this is potentially a costly and time consuming process, where possible it should be facilitated through external dispute resolution (EDR) schemes to simplify the process and reduce costs for consumers. We would however recommend that amendments be made to the operation of EDR schemes to ensure precedent is followed, rather than case by case decisions being made, in order that all industry participants have certainty in decision making around risk measures.